

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33794

CHRISTOPHER LEROY HARRIS,)	2008 Unpublished Opinion No. 727
)	
Petitioner-Appellant,)	Filed: December 3, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
STATE OF IDAHO,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Respondent.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Ronald E. Bush, District Judge.

Orders partially denying request for appointed counsel and denying post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Erik R. Lehtinen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

LANSING, Judge

Christopher Leroy Harris appeals from the district court's order denying post-conviction relief. He contends that the district court erred in denying his motion for appointed counsel as to several of his claims and that the court erred in summarily dismissing all but one of his claims. We affirm.

I.

FACTS AND PROCEDURE

A Pocatello police officer observed a man he knew to be Harris driving a vehicle. The officer ran a records check and discovered Harris's license was suspended. After Harris had exited the vehicle and was standing outside a residence, the officer arrested him for driving without privileges and searched the vehicle incident to the arrest. A substance suspected to be

methamphetamine, drug paraphernalia and other contraband were discovered. A field test indicated the substance was methamphetamine.

Harris was charged with possession of methamphetamine, Idaho Code section 37-2732(c)(1), and with being a persistent violator. Pursuant to a plea agreement, Harris pleaded guilty to the possession charge and the State dismissed the persistent violator charge. Harris was sentenced to a unified term of six years, with four years determinate and the district court suspended the sentence and placed Harris on probation with the condition that he successfully complete a drug program. Harris subsequently violated the terms of his probation by being discharged from the drug treatment program. The district court then revoked his probation and sua sponte reduced his sentence to a unified term of six years, with three years determinate.

Harris filed a pro se petition for post conviction relief alleging, among other claims, that he had been denied due process and received ineffective assistance of counsel. He presented nine claims that can be summarized as follows:

(1) he was denied due process because the prosecution failed to respond to his request for discovery;

(2) he was denied due process because the prosecution “broke the chain of custody” of the suspected methamphetamine and failed to have it tested in a laboratory;

(3) he was denied due process because he was not given an opportunity to independently test the alleged methamphetamine;

(4) he was denied his right to be free from unreasonable searches because the search of his vehicle was illegal;

(5) his counsel was ineffective for failing to file a motion to compel the prosecution to respond to the discovery request;

(6) his counsel was ineffective for failing to pursue a motion to suppress the evidence obtained in the search of the vehicle;

(7) his counsel was ineffective for failing to pursue a motion to exclude the methamphetamine because the chain of custody might have been broken;

(8) his counsel was ineffective for failing to obtain an independent test of the methamphetamine;

(9) his guilty plea was not knowing, voluntary and intelligent because it was the product of duress and undue influence by his attorney.

Harris's petition was accompanied by a motion for appointment of counsel.

The State responded by filing a motion for summary dismissal of the petition. After Harris filed a response, the district court determined that all but one of the claims for relief were frivolous and declined to appoint counsel on those claims. The district court also filed a notice of intent to dismiss those claims, to which Harris did not respond. However, the district court determined that claim 6, Harris's claim that his defense counsel was ineffective for failing to file a suppression motion, merited the appointment of counsel and that this claim was not subject to summary dismissal. After an evidentiary hearing, the district court denied relief on this claim and summarily dismissed the remaining claims. Harris appeals.

Harris contends that the district court erred by denying counsel on eight of his nine claims because Idaho law does not allow a trial court to deny counsel on a claim-by-claim basis and because the eight claims warranted appointment of counsel. In addition, Harris contends that the district court erred in summarily dismissing four of his ineffective assistance claims because the court's legal reasoning was flawed.¹

II.

ANALYSIS

A post-conviction relief action is a civil proceeding in which the applicant bears the burden to prove the allegations upon which the request for relief is based. *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990); *Pierce v. State*, 109 Idaho 1018, 1019, 712 P.2d 719, 720 (Ct. App. 1985). An order for summary disposition of a post-conviction relief application under I.C. § 19-4906(c) is the procedural equivalent of summary judgment under Idaho Rule of Civil Procedure 56. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994). Therefore, summary dismissal of a post-conviction application is appropriate only if there exists no genuine issue of material fact which, if resolved in the applicant's favor, would entitle him to the requested relief. *Fairchild v. State*, 128 Idaho 311, 315, 912 P.2d 679, 683 (Ct. App. 1996). If a genuine factual issue is presented, an evidentiary hearing must be conducted.

¹ In this appeal, Harris does not challenge the district court's denial of relief on his adjudicated claim that counsel was ineffective for failing to file a motion to suppress nor does he challenge the district court's findings on that claim.

Gonzales v. State, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988). On review of a summary dismissal, we must examine the record to determine whether the trial court correctly found that there existed no genuine issue of material fact and that the State was entitled to judgment as a matter of law. *Id.* We liberally construe the facts and reasonable inferences in favor of the non-moving party. *Cowger v. State*, 132 Idaho 681, 684-85, 978 P.2d 241, 244-45 (Ct. App. 1999); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). However, we do not give evidentiary value to mere conclusory allegations that are unsupported by admissible evidence. *Phillips v. State*, 108 Idaho 405, 407, 700 P.2d 27, 29 (1985); *State v. Ayala*, 129 Idaho 911, 915, 935 P.2d 174, 178 (Ct. App. 1996); *Roman*, 125 Idaho at 647, 873 P.2d at 901.

In order to prevail on an ineffective assistance of counsel claim, an applicant must demonstrate both that his attorney's performance was deficient, and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct. App. 1989). To show deficient performance, a defendant must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman*, 125 Idaho at 648-49, 873 P.2d at 902-903. If a defendant succeeds in establishing that counsel's performance was deficient, he must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. *See also Roman*, 125 Idaho at 649, 873 P.2d at 903. The standards articulated above, although more frequently applied to conduct at trial, have equal applicability to the entry of a guilty plea. Where, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Griffith v. State*, 121 Idaho 371, 373, 825 P.2d 94, 96 (Ct. App. 1992). *See also Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *State v. Soto*, 121 Idaho 53, 55, 822 P.2d 572, 574 (Ct. App. 1991). When it is asserted that a guilty plea was the product of ineffective assistance, to prove the prejudice prong the defendant must show that there is a reasonable probability that, but for counsel's errors, he or

she would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59; *Dunlap v. State*, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004).

A trial court should appoint counsel for an indigent post-conviction petitioner if the petition “alleges facts showing the possibility of a valid claim.” *Swader v. State*, 143 Idaho 651, 653, 152 P.3d 12, 14 (2007). In applying this standard, “the trial court should consider whether the facts alleged are such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claims.” *Id.* at 654, 152 P.3d at 15. As our Supreme Court observed in *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001), a pro se petitioner may fail to allege sufficient facts to state a claim for post-conviction relief because he or she does not know the essential elements of the claim, and therefore the mere omission of an element does not necessarily justify the denial of counsel.

Here, although the district court correctly articulated the standard applicable to review of a request for appointed counsel, it is not clear that the court actually applied that standard in rejecting Harris’s request for counsel on eight of his claims. Nevertheless, based on the full record presented here, we conclude that any error in the denial of counsel on these claims was harmless or was rendered moot by the district court’s findings on the one ineffective assistance of counsel claim that went to an evidentiary hearing with Harris being represented by counsel.

We begin by noting that, as the district court held, Harris’s claims 1 through 4 for alleged denials of due process or misconduct by the prosecutor in the criminal case were waived by Harris’s guilty plea. A valid guilty plea, voluntarily and understandably given, waives all nonjurisdictional defects and defenses, including those based on the constitution. *Clark v. State*, 92 Idaho 827, 832, 452 P.2d 54, 59 (1969); *Heartfelt v. State*, 125 Idaho 424, 426, 871 P.2d 841, 843 (Ct. App. 1994). A post-conviction action may not be used to present a claim that was knowingly, voluntarily and intelligently waived in the criminal proceeding. I.C. § 19-4908. Therefore, Harris’s claims 1 through 4 were not cognizable in a post-conviction action. These claims could have been restated into actionable claims with the assistance of an appointed attorney only by converting them into claims for ineffective assistance of Harris’s defense counsel because counsel failed to object to the alleged due process violations and prosecutorial misconduct. In this case, however, Harris himself, acting pro se, did articulate ineffective assistance of counsel claims (his claims 5 through 8) that corresponded to the noncognizable

claims 1 through 4. Therefore, there was no prejudice to Harris in denying counsel as to claims 1 through 4.

Construed liberally, Harris's claims 5, 7, and 8 alleged that his defense counsel should have taken certain actions (moved to compel the State to respond to a discovery request, moved to exclude evidence for a break in the chain of custody, and moved to obtain an independent test of the methamphetamine) before allowing Harris to plead guilty. Claim 9 alleged that defense counsel applied duress and undue influence to persuade Harris to plead guilty. Although some of these allegations may have raised the possibility of a valid claim, any error in the court's refusal to appoint counsel on these claims was rendered harmless or moot by the district court's findings after a full evidentiary hearing on Harris's claim 6 for ineffective assistance of counsel in failing to file a suppression motion. For that claim and the associated evidentiary hearing, Harris was represented by appointed counsel.

At the evidentiary hearing, the attorney who represented Harris in the criminal proceedings testified that he met with Harris and discussed the content of the police report setting forth the officer's version of the facts relating to Harris's arrest and the subsequent search of the vehicle. Harris told the attorney that Harris had methamphetamine in his system when he was arrested. The attorney testified that he discussed with Harris the possibility of pursuing a motion to suppress the evidence and possible defenses to the charge, including whether the substance was in fact methamphetamine. He further stated that he discussed with Harris the possibility of a motion to compel discovery, to which the prosecution had not yet responded. The attorney testified that Harris's concern was that if he were convicted, he would be sent to the penitentiary, and that Harris instructed the attorney to seek a Rule 11 (binding) plea agreement by which Harris could plead guilty to possession of methamphetamine and be placed on probation, under the proviso that Harris would be placed in a specific facility to receive treatment for his addiction. The attorney stated that he contacted the prosecutor, who stated that he would be willing to agree to this disposition but only if Harris would forgo pursuing any motions. The attorney testified that he communicated this to Harris, and Harris decided to take the opportunity to plead guilty on the very terms that he had requested. At the evidentiary hearing, the district court also relied upon a recording of Harris's change of plea hearing, at which Harris said that he had instructed his attorney not to pursue any further motions or defenses. Harris admitted in his

own testimony at the evidentiary hearing that he (not his attorney) initiated the idea as a Rule 11 plea agreement that would enable him to go into a treatment facility instead of prison.

The district court expressly found the attorney's testimony to be credible and Harris's somewhat contrary testimony to be not credible. The trial court's findings of fact included the following:

[C]learly, there was a motion to suppress issue. Mr. Neilson testified that he recognized that to be the case, and that he did what his usual practice was with his clients, which was to discuss the fact that there was a potential motion to suppress and then, and other defenses, and discussed other matters with his clients. Mr. Neilson's testimony is that Mr. Harris was, in Mr. Neilson's term, anxious from the beginning about a motion, possible motion to suppress and it was discussed. So, Mr. Neilson's testimony is not just that it was discussed, that even he characterized Mr. Harris' particular attitude, I guess, for lack of a better phrase, about a potential motion as being anxious. He also testified that he discussed with Mr. Harris a motion to disqualify Judge Smith, who had presided over a prior felony case involving Mr. Harris; that they discussed filing the motion to, or they had discussed discovery issues.

....

They talked about all of those issues. In the context of any credibility contest in this proceeding, the court finds that Mr. Neilson's statements about what he had specifically discussed with Mr. Harris, the nature of Mr. Harris' viewpoint about the same, the fact of other motions that were also discussed, which Mr. Harris acknowledged had been discussed, and the fact that at other times in his testimony, Mr. Harris had said it was a long time ago, I have trouble remembering all of it, I was confused about things, suggests to me that in that issue, if it involves an issue of credibility, then the court finds that Mr. Neilson is more credible on that issue. . . . And so ultimately, Mr. Neilson testified that led to a Rule 11 Agreement that was intended to be binding upon the court, which had the intent and purpose, agreed by the state and agreed by defense counsel, with insuring that Mr. Harris would not go to the penitentiary, but rather, would go into treatment again at the Genesis House, despite his prior record, which suggested that a possible penitentiary sentence was in fact a very real possibility in his case. . . . And in that setting, given those particular concerns, then, the court finds that it is within the range of reasonable professional assistance for defense counsel to pursue a plea bargain agreement that would guarantee to his client that he would not go to the penitentiary but rather, to go into a treatment program that his client was very eager and wanted to get back into and to avoid having to go to the penitentiary, even at the cost of abandoning, for those purposes, a motion to suppress that might very well be a motion to suppress that would be granted. . . . As part of that process, Mr. Harris completed a written guilty plea questionnaire, in which he signed the questionnaire under oath, indicating that he understood what his rights were, that he had discussed all those matters with his counsel, that he had--that he admitted to having committed the crime that was alleged against him, that he had instructed his attorney to not raise any defense as to whether he

had committed those crimes. And in that particular regard, he answered no on the questionnaire to that question, indicating that in fact he had not instructed his attorney to forego raising any defenses. The court questioned him about that response in particular detail. And at that point, Mr. Harris said that in fact he had instructed Mr. Neilson that he was not to raise any defense. So, at that point, Mr. Harris was clearly aware. I understand that Mr. Harris says today that he understood from Mr. Neilson that he didn't think the--that Mr. Neilson had said that it was not a winning argument. But regardless, Mr. Harris was aware of the issue. He could have insisted and impressed upon Mr. Neilson to in fact pursue the motion to suppress. But it's the court's view, on this record, that there is not a reasonable probability that Mr. Harris would have done anything different than what he did

Given the district court's acceptance, as true, of the defense attorney's testimony that it was Harris who wished to plead guilty in order to take advantage of an opportunity to go into treatment and thereby avoid the risk of a penitentiary sentence and that Harris elected to do this rather than pursue potential discovery and defenses, and given the district court's reliance upon Harris's statements at the change of plea hearing that he had instructed his defense attorney to forego raising any defenses, the district court's findings effectively dispose of Harris's claims 5, 7, 8 and 9. While it may seem anomalous for this Court to hold that certain of Harris's claims that were not the subject of the evidentiary hearing were nevertheless resolved at that hearing, those claims had many factual issues in common with the ineffective assistance of counsel claim that was actually tried at the evidentiary hearing, and the resolution of those factual issues for one claim resolves the same issues for all of the claims. The district court's findings at the evidentiary hearing are not challenged on this appeal. Therefore, if we were to remand to the district court for further consideration of claims 5, 7, 8 and 9, the factual findings already made as to claim 6 would necessitate denial of relief on claims 5, 7, 8 and 9. Accordingly, it is unnecessary to remand to the district court to reconsider appointment of counsel on the remaining four claims or to correct any erroneous analysis in the stated basis for summary dismissal.

III. CONCLUSION

The district court's orders denying appointment of counsel for some of Harris's claims and the order denying post-conviction are affirmed.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**